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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LAW OFFICES OF
DANIEL J. DOONAN, INC.,

Plaintiff and Appellant,

v.

KENNETH LO et al.,

Defendants and Respondents.

B186387

(Super. Ct. No. KC 042967)

APPEAL from orders of the Superior Court of Los Angeles County. Daniel J. Buckley, Judge. Affirmed in part and reversed in part with directions.

Law Offices of Daniel J. Doonan, Inc. and D. Scott Doonan for Plaintiff and Appellant.

Law Offices of Robert C. Moest and Robert C. Moest for Defendants and Respondents Kenneth Lo and Wild Chang.

The Law Offices of Daniel J. Doonan, Inc. (Doonan) appeals from orders denying its motion for attorney's fees brought pursuant to Civil Code section 1717¹ and imposing sanctions against it for filing that motion. Doonan contends that it was the prevailing party and therefore was entitled to attorney's fees as a matter of law. It also maintains that because its motion for attorney's fees was supported by authority, the trial court had no basis for imposing sanctions. We affirm the order denying Doonan's motion for attorney's fees but reverse the sanctions order.

BACKGROUND

In October 1999, Kenneth Lo (Lo) and Wild Chang (Chang) retained Doonan for litigation involving real property. On October 14, 2003, Doonan sued Lo and Chang for breach of contract and for an account stated to recover unpaid legal fees owed as a result of that litigation. Doonan sought \$26,961.33 in fees, plus interest and attorney's fees pursuant to the attorney's fees clause of the retainer agreement, which provided, "Should it ever become necessary to resort to legal action to collect any fees or costs advanced by this firm, the prevailing party shall be entitled to recover all costs incurred in such action, including reasonable attorney's fees."

On April 5, 2005, after a bench trial, the court reviewed Doonan's itemized claimed damages, subtracting or reducing particular items to arrive at an award of \$10,577.78 in favor of Doonan, of which Lo and Chang owed \$6,837.99 jointly and severally and Chang alone owed the remaining \$3,739.79. The court also stated, "I find that there is no prevailing party as to both costs and other issues." Doonan asked, "No prevailing party?" and the trial court answered, "Correct." On April 22, 2005, the trial court filed a judgment reflecting its decision and ordered the parties to pay their own costs. Doonan filed a notice of entry of judgment on April 27, 2005.

On June 24, 2005, Doonan filed a motion for attorney's fees under section 1717.² Doonan maintained that it was the prevailing party under section 1717 and Code of Civil

¹ Further undesignated section references are to the Civil Code.

² Doonan did not seek other costs in this motion.

Procedure section 1032 (hereafter CCP § 1032) as a matter of law, and that as such, it was entitled to attorney's fees under those code provisions, and the trial court had no discretion to decide otherwise. Lo and Chang opposed the motion, arguing, among other grounds, that Doonan was not a prevailing party, that a law firm that represents itself may not recover fees under section 1717, and that Doonan should be sanctioned for filing a frivolous motion. At the hearing on Doonan's motion on July 28, 2005, the trial court agreed with Lo and Chang, noting that Doonan's recovery was well below the amount sought and that the court had earlier expressed "surprise if not shock" that either side would move for attorney's fees. The court reaffirmed its ruling that there was no prevailing party in the case, denied the motion, found that it was frivolous and made in bad faith, and imposed sanctions of \$1,710 on Doonan to cover the other side's costs to oppose the motion. Doonan timely appealed the July 28, 2005 orders.

DISCUSSION

A

Doonan contends that it was the prevailing party under CCP § 1032 and that it did not represent itself but was represented by in-house counsel, entitling it to attorney's fees under section 1717. We disagree with both contentions.

Section 1717, subdivision (a), provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs" as determined by the court. An attorney who "chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation," however, cannot recover attorney's fees under section 1717. (*Trope v. Katz* (1995) 11 Cal.4th 274, 292 (*Trope*).)

By contrast, a corporation that litigates using in-house counsel may recover attorney's fees under section 1717, because "in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking

remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer [pro se litigant]. A corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf. . . . The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer.” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1093 (*PLCM*).) Whether Doonan properly comes under *Trope* or *PLCM* is a question of law that we decide de novo where the facts, as in this case, are undisputed. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176; *Sessions Payroll Management, Inc. v. Noble Construction Co., Inc.* (2000) 84 Cal.App.4th 671, 677.)

In arguing that *PLCM* governs this case, Doonan cites *Gilbert v. Master Washer & Stamping Co., Inc.* (2001) 87 Cal.App.4th 212, in which a different division of this appellate district held that a lawyer who was represented by other members of his own law firm was entitled to attorney’s fees under section 1717 when he prevailed in litigation. (*Id.* at pp. 220-222.) That lawyer-litigant, however, was both sued and represented in his personal capacity, and the “representation involved the lawyer’s personal interests and not those of the firm.” (*Id.* at p. 214.)

Such is not the case here, where the interest of the law firm itself is at stake and only Doonan attorneys are representing that interest. To borrow the language of a court in the Third Appellate District that considered the very same issue with regard to section 1717, “Here, unlike *PLCM Group* and *Gilbert*, but like *Trope*, there is no attorney-client relationship between [Doonan] and its individual attorneys. The individual [Doonan] attorneys are not comparable to in-house counsel for a corporation, hired solely for the purpose of representing the corporation. . . . When they represent the law firm, they are representing their own interests. As such, they are comparable to a sole practitioner representing himself or herself. Where, as in *Gilbert*, an attorney [litigates] in his or her individual capacity and he obtains representation from other members of his or her law firm, those other members have no personal stake in the matter and may, in fact, charge

for their work. Not so with a law firm that [litigates] in its own right and appears through various members. [¶] Here, [Doonan] incurred no attorney fees . . . , because all the work was done by members of the firm on their own behalf. Thus, [Doonan] is not entitled to attorney fees.” (*Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1211.)

Doonan cites *Garfield Bank v. Folb* (1994) 25 Cal.App.4th 1804, but that opinion does not aid it. In *Garfield Bank v. Folb*, defendant Stanley Folb (Stanley) was represented by Bradley Folb (Bradley), the in-house counsel for Stanley’s business. Although the court allowed Stanley to recover attorney’s fees under section 1717 for Bradley’s work as in-house counsel (*id.* at pp. 1806-1807, 1809-1810), nothing in the case suggests that Stanley was a lawyer or that the case had anything to do with the right of a law firm to recover attorney’s fees.

Doonan argues, correctly, that a corporation, as a fictional, non-living, non-corporeal being, necessarily cannot represent itself in court and must rely on human agents. (See *Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1318; see also Corp. Code, § 13405.) Nonetheless, incorporated law firms are subject to rules that do not apply to other corporations. For example, individual lawyers cannot assert the corporate veil against ethics and malpractice claims. (See, e.g., Bus. & Prof. Code, § 6167; *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 9; *Beane v. Paulsen* (1993) 21 Cal.App.4th 89, 95-98.) Nor can corporate status eliminate the attorney/client privilege. (See Evid. Code, § 954, subd. (c) [“The relationship of attorney and client shall exist between a law corporation . . . and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons.”].) Likewise, attorneys who are members of a law firm cannot have an independent attorney-client relationship with that firm while representing it in litigation, and this rule necessarily applies to all law firms, whether they are self-styled as corporations or not.

B

In addition to finding correctly that Doonan's status as its own attorney made it ineligible for attorney's fees as a matter of law, the court did not err in finding no prevailing party under section 1717 and denying Doonan fees on that basis as well.

As we have seen, section 1717, subdivision (a) requires that if a contract specifies that attorney's fees should be awarded to one party or the other or to the prevailing party, then "the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees." Subdivision (b)(1) of that statute provides, "The court . . . shall determine who is the party prevailing on the contract for purposes of this section [Subject to certain exceptions that do not apply here,] the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. *The court may also determine that there is no party prevailing on the contract for purposes of this section.*" (Italics added.) Thus, if the court determines that a party has prevailed, it normally must make that determination based upon the parties' relative recoveries. But the court also has discretion to determine that no party prevailed. (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397.) A reviewing court will disturb such a determination "only if there has been a clear showing of an abuse of [the trial court's] discretion." (*Ibid.*; see also *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.)

If one party had a "simple, unqualified win" in its litigation, then that party is the prevailing party, and the trial court would abuse its discretion if it determined otherwise. (*Deane Gardenhome Assn. v. Denktas, supra*, 13 Cal.App.4th at p. 1398.) But if "both parties seek relief, but neither prevails," or if the "ostensibly prevailing party receives only a part of the relief sought" so that the judgment may be ""considered good news and bad news as to each of the parties[.]" then the trial court properly may find that no party prevailed. (*Ibid.*; see also *Hsu v. Abbata* (1995) 9 Cal.4th 863, 875-876; *Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 59-60.)

Doonan received only \$10,577.78 of the \$26,961.33 in fees it sought for the earlier litigation. Doonan did not challenge this award. Thus Doonan received less than half of

the relief it sought and did not score a simple, unqualified win. Under these circumstances, the trial court did not abuse its discretion by determining that there was no prevailing party.

C

Doonan contends that because it was the prevailing party under CCP § 1032, it necessarily was also the prevailing party under section 1717 and therefore is entitled to its attorney's fees. We need not address whether Doonan "prevailed" under CCP § 1032, however, because that section does not control attorney's fees if the contract at issue is controlled by section 1717, as in this case. CCP § 1032, subdivision (b), provides, "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Section 1717 is a statute that expressly provides otherwise. CCP § 1032 "does not purport to define the term 'prevailing party' for all purposes." (*Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124, 1128.) California courts have uniformly rejected the premise that a litigant who prevails under CCP § 1032 is "necessarily the prevailing party for purposes of attorney fees[.]" (*Galan*, at pp. 1128-1129; see also *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1271, fn. 13 ["[T]he determination of the prevailing party for the purposes of costs is not controlling as to the issue of prevailing party for the entitlement of attorney's fees."].)³

D

Doonan also contends that the trial court erred in finding that it made its motion for attorney's fees frivolously and in bad faith. We agree. Lo and Chang requested sanctions under Code of Civil Procedure section 128.5, an inapplicable statute, but the minute order and transcript from the July 28, 2005 hearing on Doonan's motion both show that the court imposed sanctions under Code of Civil Procedure section 128.6, an

³ We further note that Doonan's award was far below the minimum jurisdictional limit of \$25,000 for an unlimited civil case and could have been rendered in a limited civil case. (Code of Civ. Proc., §§ 85, subd. (a) and 1033, subd. (a).) Under such circumstances, the trial court had discretion to determine

inoperative statute.⁴ Leaving aside whether this necessarily invalidates the order, we cannot find, as the trial court did, that Doonan’s motion represented “bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay” as required by Code of Civil Procedure section 128.5, subdivision (a), and parallel provisions in Code of Civil Procedure section 128.7, subdivision (b).

“‘Frivolous’ means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.” (Code Civ. Proc., § 128.5, subd. (b)(2).) Although the standard for reviewing a trial court’s imposition of sanctions is generally abuse of discretion (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1391), we note, however, that in deciding whether any legal authority supports a litigant’s argument, the definition of “frivolous” is necessarily a question of law. Although we agree with the trial court that Doonan’s fee motion should have been denied, we do not find the statutory or case authorities to be so clear and settled on the issues raised in the motion that Doonan’s arguments may be called totally and completely without merit. (See *id.* at p. 1392 [a motion is frivolous under Code of Civil Procedure section 128.5 only if “‘any reasonable attorney would agree such motion is totally devoid of merit’”].) It also appears that the trial court imputed bad faith to Doonan based solely on the court’s finding of frivolousness, because the “court did not find, and the record does not disclose, any evidence that [Doonan] brought [its motion] solely to cause unnecessary delay or to harass [Lo and Chang].” (*Ibid.*) Moreover, the motion for fees was not frivolous despite the trial court’s statement immediately after trial that no party prevailed, because Doonan was entitled to bring to the court’s attention its statutory claim to fees and invite the court to correct any earlier errors. (See *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard*

what costs would be awarded. (Code of Civ. Proc., § 1033, subd. (a).) Costs allowable under CCP § 1032 include attorney’s fees. (Code of Civ. Proc., § 1033.5, subd. (a)(10).)

⁴ The sanctions regime laid out in Code of Civil Procedure section 128.5, subdivision (a), does not apply to actions filed after December 31, 1994. (Code Civ. Proc., § 128.5, subd. (b)(1); *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815.) The current case was filed on October 14, 2003. Code of Civil Procedure section 128.6 was designed to take effect only if the Legislature chose not to extend the operation of Code of Civil Procedure section 128.7 by January 1, 2003 (Code Civ. Proc., § 128.6, subd. (f), but the Legislature did extend section 128.7’s sunset date before section 128.6 could take effect. (*Olmstead*, at p. 815.)

Co. (1990) 223 Cal.App.3d 924, 928-929.) For these reasons, we conclude that the trial court's sanctions order was in error.

DISPOSITION

The order denying Doonan's motion for attorney's fees is affirmed. The order imposing sanctions for Doonan's motion for attorney's fees is reversed, and the matter remanded with instructions to the trial court to enter an order denying Lo and Chang's motion for sanctions. Lo and Chang shall recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)